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HARIANTO EFFENDY ZAKARIA & ORS

v.

MAHKAMAH PERUSAHAAN MALAYSIA & ANOR

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COURT OF APPEAL, PUTRAJAYA
LOW HOP BING JCA
ABU SAMAH NORDIN JCA
LINTON ALBERT JCA
[CIVIL APPEAL NO: W-01-735-2010]

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20 JULY 2012

ADMINISTRATIVE LAW: *Judicial review - Certiorari - Application to quash award of Industrial Court - Dismissal - Whether High Court can interfere with findings of facts by Industrial Court - Whether breach*

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of natural justice sufficient proof of victimisation - Whether charge against appellants proved - Whether dismissal harsh and disproportionate

LABOUR LAW: *Employment - Dismissal - Judicial review - Application to quash award of Industrial Court - Whether defect in domestic enquiry can be corrected by Industrial Court - Whether appellant*

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victimised - Whether High Court could interfere with findings of fact by Industrial Court - Whether dismissal harsh and disproportionate

The appellants, employees of the second respondent and active members of the National Union of Bank Employees, were dismissed

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from their employment. They were found guilty by a domestic inquiry for illegal picketing within the second respondent's premises. The Industrial Court held that the dismissal was with just cause and excuse. Dissatisfied, the appellants applied for judicial review under O. 53 of the Rules of the High Court 1980 for a *certiorari*

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order to quash the award of the Industrial Court. The application was rejected by the High Court. Hence, this appeal. The issues that arose for consideration, *inter alia*, were: (i) whether the High Court correctly rejected the Industrial Court's finding that the breach of natural justice was proof of victimisation; (ii) whether

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the charge against the appellants was proven; and (iii) whether the punishment of dismissal was too harsh and disproportionate to the misconduct.

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Held (dismissing appellant's appeal with costs):
Per Linton Albert JCA delivering the judgment of the court:

(1) The contention of the appellants that there was a breach of natural justice was correctly rejected by the High Court. The defective domestic inquiry and its decision did not *ipso facto* render the appellants' dismissal without just cause or excuse because the Industrial Court proceeded *de novo*. Thus, the defect in the domestic enquiry could be corrected by the Industrial Court. The appellants' argument of being victimised was patently untenable on the premise that it was on conjecture. (paras 3 & 4)

(2) As to whether the charge against the appellants by the second respondent had not been proved, this aspect of the appeal revolved entirely around findings of fact by the Industrial Court. It was not for the High Court to interfere with the findings of fact. (para 5)

(3) The charge proved against the appellants constituted very grave misconduct which involved the core of the second respondent's existence. The appellant must have been aware that dismissal would have been the inevitable punishment. The appellants' contention of discriminative practise was misconceived and was without merit as different employers react differently to proven misconduct as a step to deter other employees from the like misconduct. (*Said Dharmalingam Abdullah v. Malayan Breweries (Malaya) Sdn Bhd*; foll). (para 7)

Bahasa Malaysia *Translation Of Headnotes*

Perayu-perayu, pekerja responden kedua dan juga ahli-ahli aktif dalam Kesatuan Kebangsaan Pekerja-Pekerja Bank, telah dibuang kerja. Mereka didapati bersalah dalam suatu siasatan domestik kerana berpiket secara haram dalam premis responden kedua. Mahkamah Perusahaan memutuskan bahawa pemecatan itu adalah dengan sebab dan alasan yang adil. Tidak berpuas hati, perayu memohon untuk semakan kehakiman di bawah A. 53 Kaedah-Kaedah Mahkamah Tinggi 1980 untuk mendapatkan perintah *certiorari* bagi membatalkan award Mahkamah Perusahaan. Permohonan itu ditolak oleh Mahkamah Tinggi. Justeru itu, rayuan ini. Di antara isu-isu yang dibangkitkan bagi pertimbangan mahkamah adalah: (i) sama ada Mahkamah Tinggi telah dengan betul menolak dapatan Mahkamah Perusahaan bahawa pelanggaran

A hak keadilan asasi adalah bukti penganiayaan; (ii) sama ada pertuduhan terhadap perayu-perayu telah terbukti, dan (iii) sama ada hukuman buang kerja adalah terlalu keras dan tidak seimbang dengan salah laku.

B **Diputuskan (menolak rayuan dengan kos):**
Oleh Linton Albert HMR menyampaikan penghakiman mahkamah:

(1) Hujahan perayu bahawa terdapat pelanggaran keadilan hak asasi telah secara betul ditolak oleh Mahkamah Tinggi. Kecacatan prosedur siasatan dalaman dan keputusannya tidak, secara *ipso facto*, mewajarkan pemecatan perayu-perayu tanpa sebab atau alasan adil kerana prosiding Mahkamah Perusahaan diteruskan secara *de novo*. Oleh itu, kecacatan dalam siasatan dalaman boleh dibetulkan oleh Mahkamah Perusahaan. Hujahan bahawa pihak perayu telah menjadi mangsa tidak dapat dipertahankan berasaskan alasan bahawa ia adalah pada sangkaan semata-mata.

(2) Berkenaan isu sama ada pertuduhan terhadap perayu-perayu oleh responden kedua telah dibuktikan atau tidak, aspek rayuan ini berkisar sepenuhnya sekitar dapatan fakta oleh Mahkamah Perusahaan. Ia bukanlah untuk Mahkamah Tinggi campur tangan dengan penemuan fakta.

(3) Pertuduhan yang dibuktikan terhadap perayu-perayu merupakan salah laku yang serius yang melibatkan isu utama kewujudan responden kedua. Perayu-perayu sepatutnya menyedari bahawa pemecatan adalah hukuman yang tidak bolek dielakkan. Hujahan perayu-perayu berkenaan amalan diskriminasi adalah disalah anggap dan tidak bermerit kerana majikan yang berlainan bertindak balas secara berbeza terhadap salah laku yang dibuktikan sebagai langkah menghalang pekerja lain daripada melakukan salah laku yang sama (*Said Dharmalingam Abdullah v. Malayan Breweries (Malaya) Sdn Bhd*; diikuti).

Case(s) referred to:

Menara Panglobal Sdn Bhd v. Arokianathan Sivapiragasam [2006] 2 CLJ 501 CA ***(refd)***

Non-Metallic Mineral Products Manufacturing Employees Union & Ors v. South East Asia Fire Bricks Sdn Bhd [1976] 1 LNS 85 FC ***(refd)***

Said Dharmalingam Abdullah v. Malayan Breweries (Malaya) Sdn Bhd [1997] 1 CLJ 646 SC ***(foll)***

Wong Yuen Hock v. Syarikat Hong Leong Assurance Sdn Bhd & Another Appeal [1995] 3 CLJ 344 FC ***(refd)***

Legislation referred to:
Rules of the High Court 1980, O. 53

For the appellant - Anand Ponnudurai (Alex De Silva with him); M/s Bodipalar Ponnudurai De Silva
For the respondent - Thavalingam C Thavarajah (Sivagami Sivalingam with him); M/s Lee Hishamuddin Allen & Gledhill

[Editor's note: For the High Court judgment, please see Harianto Effendy Zakaria & Ors v. Mahkamah Perusahaan Malaysia & Anor [2011] 5 CLJ 188.]

Reported by Sandra Gabriel

JUDGMENT

Linton Albert JCA:

[1] The appellants were employees of the second respondent and were also active members of their union, the National Union of Bank Employees. They were dismissed from their employment because they had conducted themselves in a manner which had led-to the disruption to the second respondent's business and operations and bringing disrepute to the second respondent's image by participating in an unlawful picket within the premises of the second respondent. Representations were made and ultimately referred to the Industrial Court to determine whether the dismissals were with just cause and excuse. The decision of the Industrial Court was in the affirmative. Dissatisfied, the appellants applied for judicial review under O. 53 of the Rules of the High Court 1980 for an order of *certiorari* to quash the award of the Industrial Court dismissing their claim. The application was refused by the High Court. Hence this appeal which we had dismissed with costs. We now give our reasons therefor.

[2] It is perhaps useful to set out the relevant principles set out and applied by the learned judge in her judgment although we do not propose to replicate them because the pith would suffice as the principles are well settled. In *Menara Panglobal Sdn Bhd v. Arokianathan Sivapiragasam* [2006] 2 CLJ 501 Mohd Ghazali Yusoff JCA (as he then was) said at p. 527:

A (i) judicial review is not an appeal from a decision but a review of the manner in which the decision was made;

(iv) the High Court will not interfere with finding of facts by the Industrial Court unless the same are completely unsupported by evidence and further, will not interfere merely because it may come to different conclusions on facts on the basis of the same evidence; weighing and assessing the evidence of the witnesses is the function of the Industrial Court and not that of the High Court.

C And in *Non-Metallic Mineral Products Manufacturing Employees Union & Ors v. South East Asia Fire Bricks Sdn Bhd* [1976] 1 LNS 85 Raja Azlan Shah FCJ (as His Majesty then was) said:

The circumstances under which the High Court can interfere with the decision of the Industrial Court are limited. For instance, it D was 170 jurisdiction under s. 25 of the Courts of Judicature Act to interfere with the findings of fact reached by the Industrial Court on the ground that the decision is erroneous except where there is a clear error of law on the face of the record.

E It cannot arrogate the powers of a Court of Appeal by substituting its own judgment for that of the Industrial Court on question of fact and cannot review the evidence.

[3] The first ground canvassed before us by learned counsel for the appellants revolved around matters relating to breach of F natural justice rendering the domestic inquiry instituted by the second respondent and its findings defective and victimisation of the appellants because they were active union members. The learned judge was clearly correct in concluding that the defective domestic inquiry and its decision did not *ipso facto* render the G dismissal of the appellants without just cause and excuse because the Industrial Court proceeded *de novo*. The defective domestic inquiry was therefore inconsequential. In *Wong Yuen Hock v. Syarikat Hong Leong Assurance Sdn Bhd & Another Appeal* [1995] 3 CLJ 344 the Federal Court held that the defect in natural H justice by the respondent in that case could and ought to be cured by the inquiry in the Industrial Court. Mohd Azmi bin Hj Kamaruddin, FCJ said at p. 356:

The very purpose of the inquiry before the Industrial Court was to give both parties to the dispute an opportunity to be heard I irrespective of whether there was a need for the employer to hold a contractual or statutory inquiry. We were confident that the

> Industrial Court as constituted at present was capable of arriving at fair result by fair means on all matters referred to it. If therefore there had been a procedural breach on natural justice committed by the employer at the initial stage, there was no reason why it could not be cured at the re-hearing by the Industrial Court.

[4] The appellant's argument relating to victimisation was patently untenable premised as it was on conjecture. It is rather far-fetched to conclude that the appellants were victimised simply because they were active union members and there was breach of natural justice in the conduct of the domestic enquiry instituted to determine the charge against them.

[5] The second ground advanced on behalf of the appellants was that the charge against the appellants by the second respondent had not been proved. As this aspect of the appeal admittedly revolved entirely around findings of fact by the Industrial Court it was not for the High Court to interfere with the findings of fact in the absence of any suggestion that the findings were completely unsupported by evidence (See *Menara Panglobal Sdn Bhd v. Arokianathan Sivapiragasam* (*supra*).

[6] The final aspect of the appeal was in relation to the contention advanced on behalf of the appellants that the dismissal was too harsh and was actuated by discriminative practice. This was premised on the fact that five other employees of the second respondent were also participants in the illegal picket like the appellants but were either let off unpunished or given light punishments. In rejecting the argument that the punishment was too harsh the learned judge relied on the principle set out in *Said Dharmalingam Abdullah v. Malayan Breweries (Malaya) Sdn Bhd* [1997] 1 CLJ 646 and in our view rightly so. The Supreme Court had this to say at p. 660:

> We are prepared to accept, as a tenable proposition that, speaking generally, where misconduct has been proven, different employers might react differently. To quote Acker L J in *British Leyland UK Ltd. v. Swift* [1981] IRLR 91, 93. "An employer might reasonably take the view, if the circumstances so justified, that his attitude must be a firm and definite one and must involve dismissal in order to deter other employees, from like conduct. Another employer might quite reasonably on compassionate grounds treat the case as special."

A **[7]** In any event the charge proved against the appellants constituted very grave misconduct involving the core of the second respondent's existence and they must have been aware that dismissal would have been the inevitable punishment. The contention relating to discriminative practice was misconceived
B because the five other employees treated differently from the appellants were never adjudged guilty of the misconduct which was proven against the appellants.

In the circumstances, the appeal was dismissed with costs.

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